IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY TO "DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' [SIC] MOTION FOR PRELIMINARY INJUNCTION" [DKT #1531]

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The State of Oklahoma ("the State") submits this reply to "Defendants' Memorandum in Opposition to Plaintiffs' [sic] Motion for Preliminary Injunction" [DKT #1531] ("Defendants' Response").[1]

I. Introduction

In this preliminary injunction proceeding, the applicable law is RCRA. RCRA states that the Court may enjoin anyone who is contributing to the disposal of a solid waste that may cause an imminent and substantial endangerment to human health. The plain language of RCRA reflects that poultry waste is a solid waste. The facts in this case, as will be shown at the hearing, lead to a simple conclusion: that Defendants place their birds in the watershed, feed those birds, and those birds produce a massive amount of poultry waste that is disposed of through land application. This process, in turn, has polluted Oklahoma's water -- water that is used for drinking and recreation. There can be no doubt that people are drinking water from wells contaminated with dangerous fecal bacteria from poultry waste. And there can be no doubt that this summer, unless this injunction is granted, that people will recreate in water that is contaminated with dangerous fecal bacteria from poultry waste. This presents an unacceptable risk to human health. The State simply asks for the Court to apply the plain language of RCRA to the facts in this case, and to enter an injunction against Defendants.

II. Argument

A. The State has shown a likelihood of success on the merits

1. Poultry waste is a "solid waste" within the meaning of RCRA[2]

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[1] The State adopts and incorporates by reference each of the other reply briefs it is filing in reference to its Motion for Preliminary Injunction [DKT #1373].

[2] With respect to their argument as to "solid waste," Defendants rely heavily on the affidavits of Mr. Fortuna and Ms. Williams. These affidavits largely consist of legal conclusion

Defendants advance two arguments in support of their contention that poultry waste is not a "solid waste" within the meaning of RCRA. First, Defendants argue that legislative history and certain federal regulations imply that Congress meant to exempt animal manures from RCRA -- even though the statute's plain language belies this argument. Second, Defendants argue that poultry waste is not discarded, but rather beneficially reused -- even though Defendants do not deny that hundreds of thousands of tons of their poultry waste are dumped on land in the IRW each year. Neither argument advanced by Defendants has merit.

As to Defendants' first argument, RCRA does not exempt animal manures from its scope. This is clear from the plain language of the RCRA statute's definition of "solid waste" and of the C.F.R. provisions in RCRA that address "animal manures." 42 U.S.C. § 6903(27) specifically includes discarded materials resulting from "agricultural operations" in the definition of the term "solid waste":

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, ...

(Emphasis added.)[3] In addition to RCRA's plain statutory language including agricultural wastes within the definition of "solid waste," 40 C.F.R. § 261.4(b) identifies "animal manures" as being included within the definition of "solid wastes."

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and are improper for the reasons set forth in "Motion in Limine to Exclude Testimony of Marcia Williams and Richard Fortuna." [DKT #1538] Accordingly, the Court should not consider these affidavits.

[3] Even if the plain language of the statute were not persuasive enough, the EPA views animal manure as a solid waste under RCRA. In September 2006, the United States, at the request of the EPA, brought an enforcement action in the Western District of Oklahoma against an animal manure generator alleging that land-applied swine effluent was "solid waste" that was creating an imminent and substantial endangerment under 42 U.S.C. § 6973. (42 U.S.C. § 6973

Despite this plain language, Defendants nevertheless appear to suggest that 40 C.F.R. § 257.1(c)(1) exempts "animal manures" from the definition of "solid waste." To do so, however, would be to take 40 C.F.R. § 257.1(c)(1) out of its context. 40 C.F.R. § 257.1(c)(1) provides:

> These criteria apply to all solid waste disposal facilities and practices with the following exceptions: (1) the criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

(Emphasis added.) As explained in 40 C.F.R. § 257.1(a), these criteria "are adopted for determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment under sections 1008(a)(3) [42 U.S.C. § 6907(a)(3)] and 4004(a) [42 U.S.C. § 6944(a)] of the Resource Conservation and Recovery Act (The Act)." That is to say, they were adopted to define practices that constitute open dumping and to classify disposal sites as open dumps or sanitary landfills for purposes of developing state solid waste plans and for setting forth criteria for sanitary landfills.[4] Thus, the "animal manure" exception found in 40 C.F.R. § 257.1(c)(1) is inapplicable.[5] Simply put, Defendants' poultry waste is a

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is the federal government analog to the 42 U.S.C. § 6972 citizen suit provision). *See United States v. Seaboard Farms, LP*, 5:06-cv-00990-HE, W.D. Okla., ¶ 12 of Sept. 14, 2006 Complaint (United States (attached as Exhibit 1).

[4] While these criteria may have some applicability for a violation claim brought under 42 U.S.C. § 6972(a)(1)(A), they are irrelevant to an imminent and substantial endangerment claim, such as the one here, being brought under 42 U.S.C. § 6972(a)(1)(B), because, unlike a violation claim, an imminent and substantial endangerment claim is not dependent on a violation of a permit, standard, regulation, condition, requirement, prohibition, or order (*i.e.*, criteria) which has become effective pursuant to RCRA.

[5] Even assuming *arguendo* that 40 C.F.R. § 257.1(c)(1) were applicable (which it is not), Defendants' argument would still fail. Even under Defendants' (incorrect) argument, 40 C.F.R. § 257.1(c)(1) would not exempt all animal manures from RCRA's scope. Rather, it would exempt from its coverage of "solid waste" only those animal manures that are in fact returned to the soil as actual fertilizer or soil conditioner. The general rule is that the party seeking the benefits of a statutory exception bears the burden of proof on the applicability of the exception. *United States v. First City National Bank*, 386 U.S. 361, 366 (1967). This general rule holds true with respect to environmental statutes, including RCRA. *See, e.g., California v. M & P*

"solid waste" within the meaning of RCRA. *See* 42 U.S.C. § 6903(27) ("The term 'solid waste' means . . . discarded material . . . resulting from . . . agricultural operations, . . ."). No purported exception applies.

As to Defendants' second argument -- that poultry waste is not discarded, but rather beneficially reused -- this, too, must fail. There is no definition of "discarded" in the RCRA statute. *United States v. ILCO*, 996 F.2d 1126 (11th Cir. 1993), however, is instructive in understanding the term. In *ILCO* the Eleventh Circuit held that lead parts which have been reclaimed from spent car and truck batteries by a smelter for recycling in another industrial process are a solid waste within the meaning of RCRA. The Eleventh Circuit reasoned:

> Somebody has discarded the battery in which these components are found. This fact does not change just because a reclaimer has purchased or finds value in the components. . . . It is unnecessary to read into the word "discarded" a congressional intent that the waste in question must finally and forever be discarded, as ILCO seems to argue. It is perfectly reasonable for EPA to assume Congress meant "discarded once." Were we to rule otherwise, waste such as these batteries would arguably be exempt from regulation under RCRA merely because they are potentially recyclable. Previously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste.

Id. at 1131-32 (emphasis in original). Here the evidence is undisputed that poultry waste has no further use or role in the poultry growing process and must be periodically discarded from the poultry growing houses. Thus, *ILCO* clearly supports the proposition that poultry waste is "discarded." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), likewise, clearly supports the proposition that poultry waste is "discarded." In *Safe Air* the Ninth Circuit held that

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Investments, 308 F.Supp.2d 1137, 1145-46 (E.D. Cal. 2003) (defendant bears burden of establishing applicability of RCRA "empty container" exception); *United States v. Eastern of New Jersey, Inc.*, 770 F.Supp. 964, 978 (D.N.J. 1991) (defendant bears burden of establishing applicability of RCRA "small quantity generator" exception). Thus, it would not be enough for Defendants to simply say there is an "animal manure" exception to RCRA. Instead, assuming *arguendo* that were an "animal manure exception," Defendants would be required to affirmatively prove the exception's applicability. Defendants have not done so.

because the same growers reuse the grass residue in a continuous process for Kentucky bluegrass production, grass residue remaining after Kentucky bluegrass harvest is not a solid waste within meaning of RCRA. Notably, however, unlike in *Safe Air*, poultry waste is not being reused in a continuous process for growing poultry. Simply put, the mere fact that poultry waste has the potential, in appropriate circumstances, to be reused in a different field of agriculture at some later time in no way diminishes the fact that poultry waste when it leaves the poultry growing house is being discarded and presents a waste disposal problem. *Cf. American Mining Congress v. EPA*, 907 F.2d 1179, 1186-87 (D.C. Cir. 1990).

Finally, the State has provided compelling evidence that reuse of poultry waste in the IRW is inappropriate due to a pre-existing surplus of P in the soils of IRW fields (i.e., that poultry waste is not being put to a beneficial reuse).[6] *See, e.g.*, DKT #1373 (Ex. 14). Defendants nonetheless advance the argument that in a beneficial reuse analysis one should look to whether the product as a whole has some benefit in the use to which it is put, and overlook whether one or more constituents of the solid waste has an adverse environmental effect. This argument is specious as it would insulate pollution-causing mixtures so long as there is but one "beneficial" constituent. Such a result would be wholly inconsistent with EPA policy. *See, e.g.*, 50 Fed. Reg. at 618 (EPA "is guided by the principle that the paramount and overriding statutory objective of RCRA is protection of human health and the environment. The statutory policy of encouraging recycling is secondary and must give way if it is in conflict with the principle objective") (citations omitted).

[6] Defendants also suggest that there is no "intent" to discard the poultry waste. The operative question would be not whether there is an intent to beneficially reuse poultry waste, but rather whether it is in fact being beneficially reused.

2. Poultry waste may (and does) present an imminent and substantial endangerment to health in the IRW

Defendants argue that the State will not be able to prove its claim of an imminent and substantial endangerment to human health. That determination awaits the evidence which must be evaluated under the proper RCRA standards.[7] The Tenth Circuit set out the appropriate standards in *Burlington Northern & Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007), in which it stated that to establish imminence, "there must be a threat which is present now, although the impact of the threat may not be felt until later" and that "[a]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." (Emphasis in original) (quotations and citations omitted). Moreover, "endangerment is substantial where there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken," and "if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment." *Id. at* 1021 (quotations and citations omitted).

Significantly, in *Burlington Northern* the Tenth Circuit reversed a grant of summary judgment and explicitly rejected three of Defendants' favorite arguments: that the plaintiff failed to point to any person who had been injured, that regulatory agencies had not acted, and that plaintiff had monitored the migration of pollution onto its property for years without acting. *Id.* at 1021. Proof of harm to a living population is unnecessary to succeed on the merits because

[7] Defendants' characterization of the evidence is obviously selective, one sided, and internally inconsistent, as in their assertion that there is no evidence of "unusual bacterial levels" in the IRW, Defendants' Response, p. 16, while conceding that standards are exceeded in high flow events, Defendants' Response, p. 17, when rainfall washes the bacteria off of their waste disposal fields. After years of disposing of some 700 million pounds of waste annually, conditions that once were "unusual" are now apparently Defendants' "new normal" and hence not unusual.

RCRA does not require actual harm, but threatened or potential harm. *Id.* These are the standards by which the Court should evaluate the evidence.

3. Defendants have contributed to the handling or disposal of poultry waste in the IRW

Defendants' arguments regarding "contributing to" liability under RCRA and the *Aceto* decision are inaccurate and inconsistent. Defendants plainly state that they "do not disagree" with the Fifth Circuit's broad definition of "contributing to" liability under RCRA as set forth in *Cox v. City of Dallas*, 256 F.3d 281, 294 (5th Cir. 2001). Defendants' Response, p. 20. However, Defendants then argue that the *Aceto* decision placed "a cutting off point" on RCRA contributor liability, and that *Aceto* requires that a party control the entity that handled or disposed of waste in order to be liable under "contributing to" liability. *See* Defendants' Response, pp. 20-21. Defendants are misreading the *Aceto* decision, and ignoring other important case law and legislative history regarding RCRA "contributing to" liability.[8]

In *Aceto*, the Eight Circuit Court of Appeals reviewed a district court's decision to dismiss a claim brought under RCRA. In reversing the District Court's decision to dismiss, the court explained,

> We disagree with the district court's conclusion that RCRA should be narrowly construed. The legislative history supports a broad, rather than a narrow, construction of the phrase "contributed to." . . . We also disagree with the district court's conclusion that an explicit allegation of "control" is required. We find the complaint alleges sufficient facts from which a trier of fact could infer defendants "contributed to" Aidex's disposal of wastes.

U.S. v. Aceto Agricultural Chemical Corp., 872 F.2d 1373, 1383 (8th Cir. 1989). Clearly, *Aceto* discourages narrow interpretations of "contributing to" liability, and supports the position that "contributing to" liability does not require explicit control, but rather "contributing to" liability

[8] The State will not repeat its discussion of relevant RCRA authorities here, but refers the Court to the State's Motion at pp. 14 -16.

can be established by inference through a number of factors. Thus, Defendants' argument that explicit control must be demonstrated for "contributing to" liability is wrong.

Defendants also argue that, unlike the defendants in *Cox* and *U.S. v. Valentine*, they have no role in generating the waste at issue. *See* Defendants' Response, pp. 20 - 21, fn. 14. The notion that Defendants have no role in generating poultry waste is preposterous. As Defendants readily admit in their Opposition, they own the birds, they own and provide the feed for the birds, they provide medications for the birds, and they provide technical support for growing the birds. *See* Defendants' Response, p. 23. Defendant-owned birds, eating Defendant-owned feed is the generation of poultry waste by Defendants. Defendants are responsible for this solid waste.

Defendants next make the unsupported assertion that an agency relationship must be demonstrated between Defendants and their growers in order for injunctive relief to be granted under RCRA for "contributing to" liability. Defendants, however, provide no authority to support their position that these legal principles are applicable to the RCRA analysis of "contributing to" liability.

Defendants also attempt to argue that they do not exercise control over their growers. But there is sufficient evidence to demonstrate that Defendants do in fact have control over their contract growers' operations and the manner in which poultry waste is handled by them. One very obvious example of this is that Peterson Farms, Inc., Cargill, Inc., Tyson Foods, Inc., Cobb-Vantress, Inc., Simmons Foods, Inc., and George's, Inc. signed a settlement agreement in the *City of Tulsa* case, which was filed in this Court, in which each of these Defendants agreed to an immediate moratorium on the land application of poultry waste in the Eucha-Spavinaw

Watershed.[9] *See* Ex. 2 (Order Approving Settlement Agreement).[10] These same Defendants that entered into the *City of Tulsa* settlement agreement, however, now argue in their Response, p. 25, that they "have no control over the Contract Growers' use or sale of litter." These Defendants' arguments concerning a lack of control over their growers and the manner in which poultry waste is handled are simply not credible.

In their attempt to distance themselves from their growers, Defendants launch a baseless attack on Dr. Robert Taylor that mischaracterizes his testimony and positions. Dr. Robert Taylor will testify at the preliminary injunction hearing, and the Court will have an opportunity to evaluate his expertise and testimony at that time. Suffice it to say, Defendants' characterization of his testimony are incorrect as they take his comments wholly out of context.[11]

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[9] Defendants argue in footnote 13 of their Response that injunctive relief is "wholly inappropriate" in this case. However, in the *City of Tulsa* case, which is more similar to the instant case than any of the cases cited by Defendants, many of the same Defendants involved in this case voluntarily reached a settlement agreement that included injunctive relief in the form of a temporary moratorium on the land application of poultry waste. *See* Ex. 2 (Order Approving Settlement, p. 2) ("[a]s described in the Agreement, effective immediately, there shall be a Moratorium on land application in the Watershed of Poultry Litter").

[10] The terms of this settlement agreement provided that these Defendants would not do the following: "engage in or knowingly permit the Land Application of Poultry Litter . . . on a Contract Grower's property in the Watershed," "engage in or knowingly permit the sale or transfer of any Poultry Litter produced by a . . . Contract Grower in the Watershed to any other Landowner in the Watershed for Land Application," or "continue to place birds with any Contract Grower who has been determined by the Company or the WMT to have engaged in or permitted the Land Application of Litter on his property." *See id.* at ¶ 3 (a), (b), and (d).

[11] For example, Defendants erroneously argue that Dr. Taylor is a "known crusader against the poultry industry." This is simply not true. *See, e.g.,* Ex. 3, Taylor Depo., 140:3-140:9, 140:19-141:5. Likewise, Defendants' arguments about Dr. Taylor using terms such as "bubbas" and "fascism" are simply excerpts of cross-examination from the deposition taken out of context. Upon reading the surrounding pages of these excerpts, one can understand the context of this terminology and see that these arguments are simply cheap shots at Dr. Taylor that fail to address his substantive and relevant opinions regarding the poultry industry.

Defendants also argue that because contract growers have identified themselves as "independent contractors" in depositions and because contracts state that growers are "independent contractors," Defendants do not have control over the poultry waste produced as a result of those contracts. Whether control exists is determined by the facts, not by how parties may choose to characterize their relationship. *See, e.g., Tyson Foods, Inc., v. Stevens*, 783 So.2d 804, 808-09 (Ala. 2000) (rejecting Tyson's argument that contract identifying hog grower as "independent contractor" shielded Tyson from liability); *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp.2d 693, 718-721 (W.D. Ky. 2003) (holding Tyson responsible for CERCLA reporting requirements as the "person in charge" of contract growers' facilities despite Tyson's argument that growers were "independent contractors").

As will be demonstrated at the preliminary injunction hearing, Defendants exert almost total control over the growers' work. Defendants own the birds the entire time the birds are with the growers.[12] The Defendants own the feed given to the birds and dictate what is in that feed and when and how it is provided.[13] Defendants provide continuous oversight and critiques to growers about the manner in which they are raising Defendants' birds and keeping the houses.[14] The Defendants dictate specific requirements for growers' poultry houses, and growers risk being

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[12] *See* Defendants' Response, p. 23. *See also* Response Exhibit 35, TSN36507SOK Grower Contract, at p. 1 ("Company will furnish Producer with and will retain title and ownership of chickens, feed, and medication. Company will determine the amount, type, frequency, and time of delivery to and pick-up from Producer of chickens, feed and medication.").

[13] *See, supra*, footnote 12.

[14] *See* Opposition Exhibit 35, TSN36507SOK Grower Contract at p. 1 ("Company will provide veterinary services and technical advice to assist Producer's production of Broilers").

terminated from growing arrangements if they do not meet Defendants' demands.[15] In addition, the contracts that the growers enter into are not negotiable for the growers, despite the fact growers take considerable risk (such as taking on very large mortgages for poultry houses) in order to enter into those contracts.[16]

Defendants' arguments regarding "contributing to" liability close with the fallacious argument that the State is trying to enjoin individuals who buy poultry waste. As explained above, and as demonstrated by the *City of Tulsa* settlement, Defendants have power over what happens to the poultry waste at the growers' operations, just as they exercise power over all the other aspects of a growers' operation. The injunctive relief sought by the State simply seeks to have Defendants take responsibility for the poultry waste they generate in the IRW, and to use their control to stop the land application of that waste. The "buck stops" with the Defendants who have the power to control the waste they generate, and those are the ones who the State is seeking to enjoin.

4. The State can establish RCRA causation

Similar to the argument posited in Peterson's Separate Response, Defendants next argue that the State cannot make its case without specific evidence concerning "each and every Grower." Defendants' Response, p. 26. In essence, it is Defendants' position that without such individualized evidence, the Court must simply ignore the fact that they annually generate

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[15] *See, e.g.,* Defendants' Opposition Exhibit 35, TSN36507SOK Grower Contract at Schedule B, Sections B and C. "Minimum Housing Requirements" and "Premium Compensation Requirements" (dictating requirements for all aspects of poultry houses including sizes of roads leading to houses, sizes and speeds of fans, curtains, sizes of feeders, temperature requirements to the specific degree, and various requirements for different types of equipment).

[16] *See* Ex. 5 to State's Motion (Taylor Affidavit). *See also* Ex. 4, Deposition of Simmons 30(b)(6) witness Gary Murphy, p. 126:11-15; Ex. 5, Deposition of Peterson 30(b)(6) witness Ray Wear, p. 39:7-11; Ex. 6, Deposition of George's 30(b)(6) witness Benny McClure, p. 133:5-10 (acknowledging that contracts are not negotiable for growers).

345,436 tons of poultry waste in the IRW in such a manner that releases into the rivers and streams are certain. However, contrary to the Defendants' urging, no such heightened causation standard exists.

Defendants cite only one case in "support" of their “each and every Grower” argument, *Prisco v. A & D Carting Corp.*, 168 F.3d 593 (2nd Cir. 1999). However, the *Prisco* decision is readily distinguishable. The *Prisco* case involved several private defendants who allegedly transported hazardous materials to a landfill. However, the plaintiff offered the testimony of a single witness who could link "only four of the defendants . . . to any particular types of material" such as "rugs, wires, and other items." *Prisco*, 168 F.3d at 604 (emphasis added). The lower court assumed that these defendants did transport the "rugs, wires, and other items," but found that the plaintiff had "failed to prove that any of these items actually contained, let alone released, hazardous substances." *Id.* (citation omitted). On appeal, the plaintiff argued that the lower court erred in "requiring her to prove that the waste attributable to particular defendants was linked to a risk of imminent and substantial endangerment." *Id.* at 609. In rejecting this argument, the Second Circuit merely noted the obvious point that the plain language of § 6972(a)(1)(B) applies only to those who "handle, store, treat, transport, or dispose of 'waste which may present an imminent and substantial endangerment to health or the environment.'" *Id.*

It is anyone's guess how Defendants have come to the conclusion that this rather unremarkable case supports their purported "each and every Grower" causation standard. The evidence of "rugs, wires, and other items" in *Prisco* is a far cry from the substantial scientific evidence in the case at bar that each Defendant in fact generates massive quantities of fecal bacteria-laden waste which is land applied in such a manner that releases into rivers and streams

is a certainty. While Defendants wish for a non-existent "each and every Grower" standard, the State has adhered to an "each and every Defendant" standard. This is all that RCRA requires.

The overall thrust of Defendants' argument is that the case at bar is all about the individual growers. Defendants even go so far as to suggest that the Court must directly enjoin each and every one of the individual growers. And, Defendants once again attempt to disavow responsibility for the growers by claiming they are "independent." However, the State did not sue the growers; it sued these integrator Defendants. As explained above, Defendants' "independent contractor" arguments are completely without merit. Defendants exert the control and dominion over the growers' conduct such that enjoining Defendants will address the problem before the Court. *See International Brotherhood of Teamsters, Local 523 v. Keystone Freight Lines, Inc.*, 123 F.2d 326, 329 (10th Cir. 1941) (citations omitted); *see also Hodgson v. Humphries*, 454 F.2d 1279, 1284 (10th Cir. 1972); *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1155 (10th Cir. 2007). For these reasons, the Court should reject Defendants' invitation to impose an "each and every Grower" causation standard.

5. The State's evidence is reliable and unbiased

Defendants' assertion that the State has produced no reliable scientific evidence sufficient to support its Motion is flat wrong. As will be shown at the preliminary injunction hearing, the State's experts are qualified scientists who have sampled, analyzed and studied the impacts of Defendants' pollution of the IRW using relevant and reliable scientific methods. Their testimony will demonstrate that the land application of poultry waste in the IRW adversely affects the water quality of the IRW by showing: (1) Defendants have generated poultry waste which has been land applied on fields within the IRW; (2) the poultry waste contains pathogenic bacteria; (3) the poultry waste, including the bacteria, has run off from the fields and leached into the surface and

ground waters of the state; and (4) these waters of the IRW have levels of bacteria that create an unreasonable risk of harm to human health and an imminent and substantial endangerment to the public.

It is absurd to allege that any heightened scrutiny should be placed on the State's experts' work in this matter because they were hired by lawyers and asked whether they could help the State meet its evidentiary burdens -- at least no more scrutiny than any expert retained to testify in the litigation context. These experts were hired by the State to do what scientists do: state a hypothesis and test that hypothesis. Utilizing scientifically accepted methodology, the experts developed their own hypothesis and the methods to test their hypothesis: sampling protocols, sampling, analysis and evaluation. As the Court will hear in the preliminary injunction hearing, the opinions they offer are their own. *See, e.g.,* Harwood Depo. 64:2-5 ("No. There's nothing [in my affidavits] that I don't accept and believe.").

Any suggestion that the State's experts should not be heard or that the Court should not weigh and evaluate the evidence presented by the State's experts is contrary to widely accepted evidentiary principles related to preliminary injunctions. "Before a court may issue a preliminary injunction, the court must weigh and evaluate the evidence . . . ." *Natural Lawn of America, Inc. v. West Group, LLC*, 484 F.Supp.2d 392, 398 (D. Md. 2007).

Defendants do not specifically seek to exclude the testimony of the State's experts. Rather, they raise several unfounded criticisms of the State's experts to give the Court a preview of their cross-examinations of those witnesses and their direct examinations of their experts. The validity of Defendants' assertions will no doubt be tested during the testimony of both the State's and Defendants' experts.

That being said, the State must address several of the mischaracterizations of the work performed by the State's experts. First, Defendants' criticisms of the State's experts mischaracterize their methodology. Although the specific results related to poultry litter are new, the methodology employed by both Dr. Harwood (PCR Analysis) and Dr. Olsen (PCA Analysis) are generally accepted scientific methodologies often used to identify the source of contamination at polluted sites.

Second, Defendants claim that there were deficiencies in the sampling conducted by the State's experts. These allegations are unfounded. Dr. Olsen and Camp Dresser & McKee ("CDM") conducted sampling in accordance with carefully planned and reliable sampling protocols that were implemented by experienced personnel. In addition, Defendants' claim of "biased" samples is ludicrous. Of course, CDM tested edge of field sampling where it knew there had been recent application of poultry waste. That is the best way to determine whether land applied poultry waste runs off of the fields.

Defendants' argument that the State's experts have done nothing more than identify fecal indicator bacteria is also misleading. The standard set for determining the likelihood of high levels of harmful bacteria, which has been set by the EPA, is to sample for the indicator bacteria identified by the State's experts. *See* 69 Fed. Reg. 41720 (2004). With respect to the State's bio-marker and poultry signature data, the State refers the Court to the Affidavits of Drs. Roger Olsen and Valerie Harwood. In addition, Drs. Olsen and Harwood will explain their methodology to the Court during their hearing testimony. Defendants will have the opportunity to cross-examine these witnesses regarding their methodology. However, as the Court will learn, Defendants' characterization of the work performed by these experts is wholly inaccurate. The work of these experts is sound and reliable and will establish that bacteria from poultry litter

reach the waters of the IRW and create an imminent and substantial endangerment to human health.

B. Although (for the reasons set forth in its Motion) it need not do so, the State has demonstrated irreparable harm

Defendants make a token effort to suggest that risk of illness to the public from bacteria originating in the waste of their birds is not an irreparable harm, without suggesting how such risk could be repaired absent an injunction. The State is not suing for damages to its citizens who have been made ill; it is suing to eliminate the risk of them becoming ill. The State has the authority to protect the health of the public, and Defendants do not argue otherwise.

Rather than seriously arguing that threat of disease to the public is not an irreparable injury, Defendants combine unrelated arguments under this heading, none of which is meritorious. First, Defendants argue that the State took too long to seek relief, Brief at 38, minimizing their own resistance to discovery and the extensive evidence which the State had to develop to support its injunction request. Second, Defendants argue that fecal bacteria die or are washed away, Defendants' Response, pp. 38-39, and so, presumably present no harm, although they make no account of the high levels of bacteria in surface and groundwater which are very much alive. Third, Defendants suggest that, because there are other sources of bacteria, enjoining their own bacteria load would not be effective. Defendants' Response, p. 39. However, no principle of law or reason prevents the State from eliminating *some* harm to its citizens because it is not eliminating *all* harm to them. Prioritizing its efforts to protect its citizens is a legitimate function of the State. Fourth, quite curiously, Defendants invoke the other supposed sources of bacteria, Defendants' Response, p. 39, such as animals, storm water (presumably carrying bacteria from animal waste), "poor well construction" (without explanation why this is a bacteria source), and septic systems, all of which (except "poor well construction")

would use the same transport pathways which carry bacteria from land applied poultry waste into the ground and surface waters. In effect, Defendants validate the State's fate-and-transport case by suggesting bacteria from these other sources get into surface or ground water. Finally, Defendants invoke the talisman of the TMDL as an alternative remedy, never explaining how this planning tool, in and of itself, stops the sort of non-point pollution caused by their poultry waste without Court involvement, or how it ever stops bacteria originating in Arkansas poultry waste from flowing into Oklahoma.

C. Balancing the harms between the parties is unnecessary

As an initial matter, without any citation to authority, Defendants assert that the "balancing of harms" prong is analytically different in preliminary injunction proceedings versus permanent injunction proceedings. Defendants' Response, p. 42. Defendants are wrong. As explained in *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007), "[the permanent injunction] standard is remarkably similar to the standard for a preliminary injunction. The only measurable difference between the two is that a permanent injunction requires showing actual success on the merits, whereas a preliminary injunction requires showing a substantial likelihood of success on the merits." Thus, the State is correct that because the plaintiff here is a sovereign and the activity at issue may endanger public health, injunction relief is proper without resort to balancing. *See, e.g., Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337-38 (4th Cir. 1983): *United States v. Bethlehem Steel Corporation,* 38 F.3d 862, 867 (7th Cir. 1994).

Next, Defendants assert that an injunction would allegedly impose substantial costs on third persons. Defendants' Response, pp. 42-44. Defendants, however, have ignored the plain language of element 3 of a preliminary injunction as set forth by the Tenth Circuit: "the

threatened injury to the movant outweighs the injury to the other party under the preliminary injunction." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001) (emphasis added) Thus, even assuming *arguendo* that a balancing of harms analysis were appropriate, it would be the harms to Defendants, not third persons that should be considered.[17] Defendants' Response cites no harms that Defendants would suffer.

Finally, Defendants argue that the Court should not enter the requested injunction because the State can achieve the same results through its own political and administrative processes. Defendants' Response, p. 44. Defendants' argument ignores the obvious fact that it is activities in the State of Arkansas which are a primary source of the problem before the Court.

D. The requested injunction is in the public interest

With respect to the public interest element, Defendants argue that the requested injunction would overrule legislative judgments that went into the regulatory schemes pertaining to poultry waste that have been enacted in Oklahoma and Arkansas. This argument is wrong on several levels. First, it ignores the fact that the Oklahoma Registered Poultry Feeding Act provides for "no discharge of poultry waste to the waters of the state," *see* 2 Okla. St. § 10-9.7(B)(1), and that other state law more generally precludes pollution of the State's waters. *See, e.g.*, 27A Okla. Stat. § 2-6-105, O.A.C. 785:45-3-2 & 2 Okla. St. § 10-9.7(B)(4)(a) & (b) ("Poultry waste handling, treatment, management and removal shall: (a) not create an environmental or a public health hazard, (b) not result in the contamination of waters of the state . . ."). Thus this action is entirely consistent with and complementary to the Oklahoma

[17] In any event, "[a] third party's potential financial damages from an injunction generally do not outweigh potential harm to the environment." *Montana Wilderness Association v. Fry*, 310 F.Supp.2d 1127, 1156 (D. Mont. 2004); *see also Colorado Wild, Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1222 (D. Colo. 2007) (finding economic harm does not outweigh environmental harm; collecting cases).

legislature's judgment. Second, it ignores the fact that the language of 42 U.S.C. § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." *See BNSF*, 505 F.3d at 1020 (citations and quotations omitted) (emphasis retained). And third, it ignores the fact that the law is well-established that an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B) is not, in any event, superseded by state environmental laws. *See, e.g., Eckardt v. Gold Cross Services, Inc.*, 2006 WL 2545918, *2 (D. Utah Aug. 31, 2006); *Dague v. City of Burlington*, 935 F.2d 1343, 1352-53 (2nd Cir. 1991), *rev'd on other grounds,* 505 U.S. 557 (1992); *T&B Limited, Inc. v. City of Chicago*, 369 F.Supp.2d 989, 993 (N.D. Ill. 2005); *Clorox Co. v. Chromium Corporation*, 158 F.R.D. 120, 124 (N.D. Ill. 1994); *Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.*, 2002 WL 1837844, *2 (E.D. La. Aug. 9, 2002).

As noted in the caselaw cited in the State's Motion, there is a strong public interest in protecting public health and the environment. It is an interest stated in both the Oklahoma statutes and in RCRA. The requested preliminary injunction will further those interests by protecting the public from exposure to fecal bacteria in poultry waste.

III. Conclusion

WHEREFORE, premises considered, the arguments advanced in Defendants' Response should be rejected, and the State's Motion for Preliminary Injunction [DKT #1373] should be granted.

Respectfully Submitted,

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